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Attorney for Defendant Guerra

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE M. JAMES LORENZ)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE MALDONADO GUERRA, JR., Defendant.	CASE NO. 08CR1027-MJL DATE: May 12, 2008 TIME: 2:00 p.m. NOTICE OF MOTIONS AND MOTIONS TO: (1) COMPEL FURTHER DISCOVERY; and (2) LEAVE TO FILE FURTHER MOTIONS

TO: KAREN HEWITT, UNITED STATES ATTORNEY, AND
ANDREW SCHOPLER, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on May 12, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard, the defendant, Jose Maldonado Guerra, Jr. ("Guerra"), by and through his attorney Benjamin P. Lechman, will ask this Court to issue an order granting the motions listed below.

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MOTIONS

The defendant, Mr. Guerra, by and through his attorney, Benjamin P. Lechman, asks this Court pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes and local rules for an order to:

1. Compel further discovery; and
2. Leave to file further motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, the files and records in the above-captioned matter, and any and all other materials that may come to this Court's attention prior to or during the hearing of these motions.

Respectfully submitted,

Dated: April 28, 2008

s/Benjamin P. Lechman
BENJAMIN P. LECHMAN
Attorney for Defendant Guerra

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Attorney for Defendant Guerra

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE M. JAMES LORENZ)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE MALDONADO GUERRA, JR. Defendant.	CASE NO. 08CR0256-MJL DATE: March 10, 2008 TIME: 2:00 p.m. STATEMENT OF FACTS AND POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS

I.

STATEMENT OF FACTS

Mr. Guerra is currently charged in two separate indictments pending before this Court. The procedural history of this case is as follows. The facts as set-forth in this motion are, for the most part, taken from reports and other investigative materials provided by the United States Attorney's Office. Thus, Mr. Guerra, does not offer a detailed set of facts at this time in addition to those alleged in the criminal complaints issued in cases 08mj0339 and 08mj0779 and within the indictment. Thus, the facts alleged in these motions are subject to amplification and/or modification at the time these motions are heard.

On February 5, 2008 Mr. Guerra was the driver and sole occupant in a 1998 Ford Explorer at the Otay Mesa Port of Entry into the United States from Tijuana. Agents in the pre-primary lane sent Mr. Guerra to the secondary inspection area where agents discovered 14.54 kilos of marijuana hidden in the spare tire compartment of the Ford Explorer. Mr. Guerra was arrested and charged in the United States District Court for the Southern District of California with importation of 14.54 kilos of marijuana. Federal Defenders of San Diego was appointed to represent Mr. Guerra, and with their assistance Mr. Guerra posted bond, was released and accepted a standard "fast-track" plea agreement.s

However, on March 10, 2008, several days before the date scheduled for Mr. Guerra's change of plea[1], he was arrested again at the Otay Mesa Port of Entry from Tijuana under almost identical circumstances. On this occasion, Mr. Guerra was the driver and sole occupant in a 2008 Chevrolet Uplander. After being referred to the secondary inspection area, agents discovered 18.35 kilos of marijuana secreted within the car's spare tire. Mr. Guerra was arrested charged again in a second criminal case in the Southern District, case number 08mj0779/08CR1027-MJL. Federal Defenders was appointed on Mr. Guerra's second case as well. However, on March 12, 2008, Federal Defenders was relieved and present Counsel was appointed.

The first indictment in case 08CR0610-MJL is still pending as of this writing, and the next date for the 08cr610-MJL case is a pre-trial Order to Show Cause (stemming from the arrest in case number 08mj0779/08CR1027-MJL) set for June 5, 2008 at 9:00 a.m. before Magistrate Judge Brooks.[2] The instant motion hearing is Mr. Guerra's first appearance before this Court.

At this time discovery is ongoing and Mr. Guerra respectfully requests a substantive motion hearing be set sometime within the next 45-60 days, to allow for receipt and review of discovery and for an opportunity to try to reach a global resolution in both cases.

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[1]Mr. Guerra was initially scheduled to enter his plea in case number 08mj0339/08CR00610-MJL on April 1, 2008 before Magistrate Judge Brooks. That date was later vacated as a result of Mr. Guerra's arrest in case number 08mj0779/08CR1027-MJL

[2]Mr. Guerra moved to dismiss the indictment in the first case, 08CR0610-MJL, because it contains nothing factually or legally that is not also charged within the second case (08CR1027-MJL). was also the

II.

MOTION TO COMPEL DISCOVERY

Mr. Guerra moves for the production by the government of the following discovery. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any government agency. See generally Kyles v. Whitley, ___U.S.___, 115 S. Ct. 1555, 1567-68 (1995); United States v. Lacy, 896 F. Supp. 982 (N.D. Cal. 1995) (prosecutor has duty to ascertain what exculpatory information may be possessed by other agencies):

(1) The Defendant's Statements Under Fed. R. Crim. P. 16 (a)(1)(A) the defendant is entitled to disclosure of all copies of any written or recorded statements made by the defendant; the substance of any statements made by the defendant which the government intends to offer in evidence at trial; any recorded testimony of the defendant before the grand jury; any response by the defendant to interrogation; the substance of any oral statements which the government intends to introduce at trial, and any written summaries of the defendant's oral statements contained in the handwritten notes of the government agent; any response to any Miranda warnings which may have been given to the defendant (See United States v. McElroy, 697 F.2d 459 (2d Cir. 1982)); and any other statements by the defendant that are discoverable under Fed. R. Crim. P. 16(a)(1)(A);

(2) Arrest Reports, Notes and Dispatch Tapes The defendant also specifically requests that all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding his arrest or any questioning, if such reports have not already been produced in their entirety, be turned over to him. This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents in which statements of the defendant or any other discoverable material is contained. This is all discoverable under Fed. R. Crim. P. 16(a)(1)(A) and Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Johnson, 525 F.2d 999 (2d Cir. 1975); United States v. Lewis, 511 F.2d 798 (D.C. Cir. 1975); United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967); Loux v. United States, 389 F.2d 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to the defendant are available under Fed. R. Crim. P. 16(a)(1)(B) and ©, Fed. R. Crim. P. 26.2 and 12(i). **Preservation of rough notes is requested,**

whether or not the government deems them discoverable at this time;

(3) Brady Material The defendant requests all documents, statements, agents' reports, and tangible evidence favorable to the defendant on the issue of guilt and/or which affects the credibility of the government's case. Impeachment as well as exculpatory evidence falls within Brady's definition of evidence favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976);

(4) Any Information That May result in a Lower Sentence Under The Guidelines As discussed above, this information is discoverable under Brady v. Maryland, 373 U.S. 83(1963). This request includes any cooperation or attempted cooperation by the defendant, as well as any information that could affect any base offense level or specific offense characteristic under Chapter Two of the Guidelines. Also included in this request is any information relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, or any other application of the Guidelines;

(5) The Defendant's Prior Record Evidence of prior record is available under Fed. R. Crim. P. 16(a)(1)(B). Counsel specifically requests a complete copy of any criminal record;

(6) Any Proposed 404(b) Evidence Evidence of prior similar acts is discoverable under Fed. R. Crim. P. 16(a)(1)[c] and Fed. R. Evid. 404(b) and 609. In addition, under Fed. R. Evid. 404(b), "upon request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the general nature . . ." of any evidence the government proposes to introduce under Fed. R. Evid. 404(b) at trial. The defendant requests that such notice be given three weeks before trial in order to give the defense time to adequately investigate and prepare for trial;

(7) Evidence Seized Evidence seized as a result of any search, either warrantless or with a warrant, is discoverable under Fed. R. Crim. P. 16(a)(1)©;

(8) Request for Preservation of Evidence The defendant specifically requests that all dispatch tapes or any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and which relate to the arrest or the events leading to the arrest in this case be preserved.

It is requested that the government be ordered to question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist to inform those parties to preserve any such evidence;

(9) Tangible Objects The defendant requests, under Fed. R. Crim. P. 16(a)(2)© the opportunity to inspect and copy as well as test, if necessary, all other documents and tangible objects, including photographs, books, papers, documents, photographs of buildings or places or copies of portions thereof which are material to the defense or intended for use in the government's case-in-chief or were obtained from or belong to the defendant;

(10) Evidence of Bias or Motive to Lie The defendant requests any evidence that any prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988);

(11) Impeachment evidence The defendant requests any evidence that any prospective government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant. See Fed. R. Evid. 608, 609 and 613. Such evidence is discoverable under Brady v. Maryland, supra. See United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988) (witness' prior record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts from a witness' credibility);

(12) Evidence of Criminal Investigation of Any Government Witness The defendant requests any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir.), cert. denied, 474 U.S. 945 (1985);

(13) Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling The defense requests any evidence, including any medical or psychiatric report or evaluation, tending to show that any prospective witness's ability to perceive, remember, communicate, or tell the truth is impaired; and any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an alcoholic. United States v. Strifler, 851 F.2d 1197 (9th Cir. 1988); Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980);

(14) Witness Addresses The defendant requests the name and last known address of each prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United

States v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel is ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. (1979) (defense has equal right to talk to witnesses). The defendant also requests the name and last known address of every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a government witness. United States v. Cadet, 727 F.2d, 1453 (9th Cir. 1984);

(15) Name of Witnesses Favorable to the Defendant The defendant requests the name of any witness who made an arguably favorable statement concerning the defendant or who could not identify him or who was unsure of his identity, or participation in the crime charged. Jackson v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis v. North Carolina, 637 F.2d 213, 223 (4th Cir. 1980); Jones v. Jago, 575 F.2d 1164, 1168 (6th Cir.), cert. denied, 439 U.S. 883 (1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086 (1980);

(16) Statements Relevant to the Defense The defendant requests disclosure of any statement that may be "relevant to any possible defense or contention" that he might assert. United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982);

(17) Jencks Act Material The defense requests all material to which Defendant is entitled pursuant to the Jencks Act, 18 U.S.C. § 3500, reasonably in advance of trial, including dispatch tapes. A verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement under § 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963);

(18) Giglio Information Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the defendant requests all statements and/or promises express or implied made to any government witnesses, in exchange for their testimony in this case, and all other information which could arguably be used for the impeachment of any government witnesses.

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III.

REQUEST FOR LEAVE TO FILE FURTHER MOTIONS

At present, the government has provided some discovery in this case and the parties have ben in discussions this past week with regard to specific discovery items needed . Without the aid of additional information, defense counsel cannot adequately prepare or file substantive motions. Accordingly, Mr. Guerra respectfully requests leave of this Court to file additional motions after discovery has been provided in this case.

IV.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant the above motions.

Respectfully submitted,

Dated: April 28, 2008

s/Benjamin P. Lechman
BENJAMIN P. LECHMAN
Attorney for Defendant Guerra